IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1888 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1&2 YES; 3 to 5 NO

GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

PRAVINSINH AJITSINH JADEJA

Appearance:

1. Special Civil Application No. 1888 of 2002

MS MONALI H BHATT for Petitioner No. 1

MR PRABHAKAR UPADHYAY for Respondent No. 1

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 06/04/2002

C.A.V. JUDGEMENT

1. By this petition under Articles 226 and 227 of the Constitution, the petitioner- State Road Transport Corporation- has challenged the award of the Labour

Court, Jamnagar in Reference (LCJ) No.184 of 1999, whereby, allowing the reference, the respondent is ordered to be reinstated with 25% backwages.

2. The respondent, a conductor in service since 8 years, was chargesheeted for the misconduct of collecting fares and not issuing tickets on 29.6.1990 and, after an enquiry, was punished with the order to place him at the minimum of the pay-scale. He preferred a departmental appeal in which an order was made that a show cause notice be issued for enhancement of the punishment as the original punishment was disproportionately light in view of the seriousness of the misconduct. Pursuant to such show cause notice for enhancement of punishment in review proceedings, the order to dismiss the respondent was passed after hearing the respondent. It appears from the relevant material placed on record, including the memo of appeal, the other proceedings of the appellate authority and the respondent's representation and the decision taken thereon, that the reason and the explanation for the lapse tendered by the respondent were neither considered nor dealt with by the appellate or the reviewing authority, who happened to be the same. In fact, the decision to take up the case in review on the ground of punishment being disproportionately light was the order in the appeal preferred by the respondent and no decision, much less a decision on any of the grounds of appeal, was rendered at all. Thus, the appeal of the respondent for reduction of punishment, in effect, back-fired and resulted into a review for enhancement of the punishment and the ultimate dismissal after three years of the order under appeal and review.

2.1 There was no dispute about the fact that the respondent was caught for having collected fares without issuing tickets to nine passengers on 29.6.1990 causing a total loss of Rs.7.85 ps. The explanation or the defence which presumably appealed to the disciplinary authority was that the tickets were not issued under an apprehension of the road leading to the destination being likely to be closed on account of heavy rains. Even when the first order of punishment was carried in appeal by the respondent and reviewed by the petitioner, the respondent maintained that he was innocent and the lapse was attributable to the prevailing circumstances of his being new on the route, being under instructions to go further only if the road was open and the bus being checked before tickets could be issued. These pleas are nowhere discussed or dealt with either in considering the appeal or in taking up the matter in review as is evident from the material placed on record by the petitioner.

3. It also appears from the impugned award that the past record of service of the respondent showing one incident of not issuing ticket after collecting fare in the year 1988 was not placed on record but it was produced as an annexure to the petition. Seven other acts of misconduct of non-issuance of tickets without collecting fares are also recorded in the default-card of the petitioner and on each occasion appropriate punishment with serious financial consequences have been imposed.

4. Against the above backdrop of facts, the controversy has to be resolved with reference to the central issue as to whether the impugned award made in exercise of Section 11-A of the I.D. Act could be sustained or is it required to be interfered. Section 11-A of the I.D.Act confers upon the Labour Court, where it is satisfied that the order of discharge or dismissal was not justified, the discretion to set aside the order and direct reinstatement of the workman on such terms and conditions as it may think fit or give such other relief including the award of lesser punishment as the circumstances of the case may require. The proviso prescribes that the Court shall rely only on the material on record. The law on the subject of exercise of judicial discretion under Section 11-A of the I.D.Act, particularly in case of misappropriation, is by now well-settled. As recently held by the Supreme Court in JANATHA BAZAR (SOUTH KANARA CENTRAL COOPERATIVE WHOLESALE STORES LTD.) v. SECRETARY, SAHAKARI NOUKARARA SANGHA [(2000) 7 SCC 517], once an act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employees in service. In case of proved misappropriation, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases. In U.P. STATE ROAD TRANSPORT CORPORATION v. SUBHASH CHANDRA SHARMA [(2000) 3 SCC 324], the Apex Court found the discretion exercised by the Labour Court, in the circumstances of that case, to be capricious and arbitrary and certainly not justified where the punishment awarded to the respondent was not shockingly disproportionate to the nature of the charge found proved against him. In case of U.P.ROAD TRANSPORT CORPORATION v. MOHAN LAL GUPTA [(2000) 9 SCC 521], the employee was found guilty of misappropriation and the employer had lost confidence vis-a-vis the employee and it was held to be improper for the Court to substitute

the findings and confidence of the employer. Number of other judgments of this Court, where the petitioner herein itself was a party, were also relied upon to emphasise the point that the power and discretion of the Labour Court under Section 11-A of the Act was not absolute or that of a Court of appeal and they were required to be exercised in a judicious and judicial manner and that in case of misappropriation by not issuing tickets after collecting fare, the punishment of dismissal was not disproportionate.

5. It is observed by a three-Judge Bench of the Supreme Court in COLOUR-CHEM LTD. v. A.L.ALASPURKAR [(1998) 3 SCC 192] as under:

> "13.....Consequently it must be held that when looking to the nature of the charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimization. On the facts of the present case there is a clear finding reached by the Labour Court and as confirmed by the Industrial Court that the charges levelled against the respondent-delinquents which were held proved even though reflecting major misconducts, were not such in the light of their past service record as would merit imposition of punishment of dismissal. This factual finding would obviously attract the conclusion that by imposing such punishment the appellant-management had victimised the respondent-delinquents. Imposition of such a shockingly disproportionate punishment by itself, therefore, has to be treated as legal victimisation apart from not being factual victimisation as on the latter aspect the Labour Court has held against the respondent-workmen and that finding has also remained well sustained on record. Thus, it must be held that the management even though not guilty of factual victimisation was guilty of legal victimisation in the light of the proved facts which squarely attracted the ratio of the decisions of this Court in HIND CONSTRUCTION AND BHARAT IRON WORKS. It is easy to visualise that no reasonable management could have punished a

> delinquent workman who in the late hours of the night shift by about 3.30 a.m. had gone to sleep keeping the machine in a working condition especially in the absence of any gross misconduct reflected by the past service record, with the extreme penalty of dismissal.....By imposing such grossly disproportionate punishment on the respondents, the appellant-management had tried to kill a fly with a sledgehammer. Consequently, it must be held that the appellant was guilty of unfair labour practice....."

5.1 On the other important aspects of the exercise of revisional powers of the reviewing authority, the respondent relied upon the Constitution Bench judgment of the Supreme Court in MAKESHWAR NATH SRIVASTAVA v. THE STATE OF BIHAR [AIR 1971 SC 1106] to submit that the conferment of power of revision on the authority possessed of appellate power indicates that the power of revision is intended to be used when an appeal could not for some reason be filed and the appellate authority felt that the order was so unjust or unreasonable that it should act under its revisional power. Relying upon a Division Bench judgment of the Allahabad High Court in JITENDRA PAL SINGH BHADAURIA v. THE CHAIRMAN & MANAGING DIRECTOR AND REVIEWING AUTHORITY, ALLAHABAD BANK [CMWP No.23424 of 1989 decided on 22.10.1997), it was submitted that the appellate authority reversing the order of the trial authority was required to give sufficient reasons for reversing the earlier order and more particularly in case of enhancement of penalty by the reviewing authority, the law requires consideration of the grounds in reply and giving of reasons in the final order in such cases. The respondent also relied upon a judgment of the Bombay High Court in MAHARASHTRA STATE ROAD TRANSPORT CORPORATION v. R.D.TOPLEWAR [1987 LAB.I.C.789] wherein, in the context of similar provision for review, it is observed that the power intended to be conferred upon the appellate authority was in the nature of revisional power. When the competent authority came to a conclusion that the delinquent employee should be acquitted, such an order of acquittal should be reopened by the higher departmental authorities in rare cases, such as, when the procedure followed by the competent authority or the enquiry officer was not proper or was against the principles of natural justice or when some material evidence or circumstances were not taken into consideration or when there was material irregularities committed by the competent authority in arriving at his decision. It was then concluded that the jurisdiction of the reviewing authority under Clause 9 of the Discipline

and Appeal Procedure was limited and could not be equated with the appellate jurisdiction. Lastly, the learned counsel for the respondent relied upon a recent judgment of this Court (Coram: R.R.Tripathi, J.) in Special Civil Application No.5157 of 1999, wherein the reviewing authority had no additional evidence to increase the penalty and, therefore, the penalty initially imposed by the disciplinary authority was restored.

5.2 As for the statutory provisions contained in the Discipline and Appeal Procedure for the Gujarat State Road Transport Corporation employees, the relevant Rules 9 and 20 read as under:

> "9. The Appellate Authority may, suo moto, call for the enquiry papers and review the decision in any case as it may deem fit."

> "20. The Appellate Authorities appointed by the Corporation for hearing appeals and reviewing cases are those shown in Schedule `C'. Any officer higher than the prescribed Appellate Authority has inherent powers to call any case papers and review the decision or hear the appeal or direct any other authority to hear the appeal."

6. Returning to the facts and the issue in the present case, the Labour Court was faced with the facts in evidence that there was no record of past misconducts, the explanation of the respondent regarding the circumstances appearing against him were not considered by the enquiry officer or the disciplinary authority and the findings were that the respondent was negligent in the performance of his duties for which the punishment of dismissal was held by the Labour Court to be excessive. It was neither canvassed nor within the normal exercise of writ jurisdiction to reappreciate the material before the Labour Court; nor was the entire material placed on record. However, even in absence of an elaborate discussion in that regard in the impugned award, it is clear, as discussed in the earlier paragraphs, that the disciplinary authority had itself taken a lenient view by imposing a lighter punishment of relegating the respondent to the minimum of his pay-scale. It was the appellate authority who, instead of deciding the respondent's appeal on merits, took the decision of taking the order of punishment in review and, after a show cause notice, enhanced the punishment. It could not

be gainsaid that neither the grounds of appeal nor the representations of the respondent in review were at all dealt with by the authority either in his capacity as an appellate authority or in his capacity as a reviewing authority. Thus, practically, the appellate and the reviewing authority rejected the appeal and enhanced the punishment without consideration of the respondent's case and only on the grounds that the punishment imposed upon the respondent was not sufficient in view of the seriousness of the offence. This makes it a serious case of violation of principles of natural justice insofar as the contentions of the respondent were disposed without application of mind and without expressing any reasons. In this context it may be pertinent to quote the following observations of the Supreme Court in a recent judgment in AMAR NATH CHAUDHURY v. BRAITHWAITE & CO. LTD. [(2002) 2 SCC 290]:-

"6. One of the principles of natural justice is that no person shall be a judge in his own case or the adjudicating authority must be impartial and must act without any kind of bias. The said rule against bias has its original from the maxim known as nemo debet esse judex in propria causa, which is based on the principle that justice not only be done but should manifestly be seen to be done.....It is not disputed that Shri S. Krishnaswami, the then Chairman-cum-Managing Director of the Company acted as a disciplinary authority as well as an Appellate Authority when he presided over and participated in the deliberations of the meeting of the Board while deciding the appeal of the appellant. Such a dual function is not permissible on account of established rule against bias. In a situation where such a dual function is discharged by one and the same authority, unless permitted by an act of legislation or statutory provision, the same would be contrary to rule against bias. When an authority earlier had taken a decision, he is disqualified to sit in appeal against his own decision, as he already prejudged the matter otherwise such an appeal would be termed an appeal from Caesar to Caesar and filing of an appeal would be an exercise in futility."

6.1 Applying the above basic principle in the facts of this case, the appellate authority, having in fact taken a tentative decision to enhance the punishment without caring even to consider the grounds of appeal,

thereafter, examined the same subject-matter in review, again without considering the case of the respondent, practically proved to be a biased judge in his own cause. These peculiar facts take this case away from the category of cases of proved misappropriation and punishment of dismissal. The powers and discretion of the Labour Court under Section 11-A of the I.D.Act are wide enough to take into account the quantum of punishment in cases where it is satisfied that the order of dismissal was not justified for any reasons. And, the power of this Court to interfere with the exercise of power of the Labour Court is again restricted when the exercise of discretion by the Labour Court is found to be justified in the facts of a particular case.

7. The learned counsel for the respondent fairly conceded that the order below the impugned award was otherwise required to be interfered insofar as even the earlier order of the disciplinary authority which was not the subject-matter of any challenge, controversy or discussion at all was not restored and the order to reinstate with 20% backwages was made. In view of the fact that the respondent was found to be guilty of negligence by the Labour Court and reference was made after five years of dismissal, the respondent was stated to be not insisting upon any order for payment of backwages. Accordingly, the petition is required to be partly allowed and the original order of punishment is required to be restored. Therefore, the petitioner is directed to reinstate the respondent within one month from the receipt of a copy of this order without any backwages and with the punishment of reducing him to the minimum of his pay-scale. Rule is made absolute accordingly with no order as to costs. Sd/-

(D.H.Waghela, J.)

(KMG Thilake)